Briefing

BURGES SALMON

Corporate Turnaround and Insolvency

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Rosserlane Consultants sees bank avoiding duty to obtain best price under particpation arrangements

The recent case of *(1) Rosserlane Consultants Ltd (2) Swinbrook Developments Ltd v Credit Suisse International [2015] EWHC 384 (Ch)* caused a bit of a stir in circumstances where the court refused to imply a duty on a bank to obtain the best price in a forced sale of a limited partnership – what's all the hoo-ha about?

The background

It is well-established law that a mortgagee exercising a power of sale has a duty, when doing so, to obtain the best price reasonably obtainable for the mortgaged property at that time.

Rosserlane Consultants provides a slight variation on this theme. The claimants were the general partner and limited partner in CEG, a limited partnership which owned a 51% stake in Shirvan, a company operating an oilfield.

When CEG came under pressure from its bank to repay or refinance its existing indebtedness, CEG took $127 million short-term finance from Credit Suisse International in December 2006. The documentation included a "participation agreement" dealing with the "equity upside" of a sale of CEG or related assets, and security over CEG's stake in Shirvan. The finance was obtained to allow CEG time to sell its stake in Shirvan, which was the only way CEG could raise funds to repay its borrowings.

The claimants failed to find a buyer for the stake, and CSI triggered its rights under the participation agreement in order to force a sale of CEG. CEG was subsequently sold for $245 million on an involuntary basis. The claimants then commenced proceedings against the bank.

The issues

The issue for the court was whether – as the claimants contended – the bank was under an obligation to take reasonable care to obtain the best price for CEG (equivalent to a mortgagee's duty), having served its trigger notice under the participation agreement and beginning a forced sale process.

What did the court decide?

The court considered that additional terms could, in principle, be implied into agreements where such a term represents the obvious but unexpressed intentions of the parties. In this case, however, it was remarkable that the participation agreement had been varied to require CEG to use "all reasonable endeavours" to procure a sale at the best price obtainable in order to maximise the "upside" payment to the bank. The agreement did not seek to impose such an obligation on the bank however, and that factor was equally significant. Accordingly, there was no rationale, given the nature of the parties, to imply terms into the participation agreement, nor were there any public policy reasons for doing so.

In particular the participation agreement was clear in the distinction between situations where the bank was enforcing its security (which had not occurred) and forcing a sale without using it security (which had). The forced sale procedures did not place the bank in the position of fiduciary, and the agreement was freely negotiated between parties advised by experienced commercial lawyers. The court did not think it helpful to blur the lines by imposing on the bank the obligations which existed between mortgagor and mortgagee – the bank had not been appointed as agent of CEG; indeed it had undertaken some actions in CEG's name (as attorney) in order to protect its position.

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What does this mean for practitioners?

Equity upside arrangements are common instruments in large restructurings , and afford lenders a synthetic equity stake in the entity being financed commensurate with the risk which the lender itself is taking on.

The court has correctly construed the participation agreement – and the forced sale procedures contained within it – as being separate from the enforcement of security. Whilst it might seem there is potential to abuse such arrangements in order to avoid the mortgagee's duty of care, in reality they are used to provide the requisite level of reward should a sale be achieved (much as with overage provisions in land sales). This case serves as a useful reminder both of the principles behind mortgagees' duties and the ways in which financiers can seek to enhance their exit position in stressed and distressed lending situations.

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